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No. 85-1160

IN THE

Supreme Court of the United States

October Term, 1985

ANGELINA SINICROPI,

Petitioner,

vs.

ROBERT J. BENNETT, as Deputy Director of Probation of the County of Nassau and COUNTY OF NASSAU,

Respondents.

Brief in Opposition to Writ of Certiorari to the New York Court of Appeals, State of New York

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Opinions Below.

The order of the Supreme Court of the State of New York, County of Nassau, entered September 25, 1984, was not officially reported. The order and decision of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is reported at 111 A. D. 2d 801 (2d Dept. 1985). The order of the New York State Court of Appeals dismissed the purported appeal as of right on the appeal of petitioner is not officially reported and is dated October 10, 1985.

Counterstatement of the Case.

On March 21, 1983, the Court affirmed a determination of respondent Bennett that found appellant guilty of certain charges and specifications and terminated her from the service of appellant county. See 92 A. D. 2d 309 (2d Dept. 1983). The New York State Court of Appeals affirmed this Court's order on November 23, 1984 at 60 N. Y. 2d 918 (1983).

Thereafter, during the course of depositions during the prosecutions of multiple civil rights actions, respondent Bennett allegedly admitted that he had discussed the testimony of one witness with him. There was no proof in the record that he discussed testimony with any other witness at the disciplinary hearing.

Thereafter, appellant commenced the within proceeding pursuant to Article 78 of the Civil Practice Law and Rules to annul the determination of respondent Bennett and remand the proceeding to respondent Bennett for a new determination.

This proceeding was commenced by the service of a notice of petition, petition and supporting papers on June 21, 1984. Answering papers were served on August 21, 1984. Reply papers were served on August 22, 1984.

On September 25, 1984, the Hon. Angelo D. Roncallo, Justice of the Supreme Court of the State of New York, County of Nassau, dismissed the petition. Appellant appealed to this Court from said order by notice of appeal dated October 12, 1984.

In an order dated June 10, 1985, the Supreme Court of the State of New York, Second Judicial Department affirmed the order appealed from. The New York State Court of Appeals dismissed the purported appeal as of right on October 10, 1985.

POINT I.

The Court below properly dismissed the petition brought against respondents.

Respondents submit that the Court below properly dismissed the petition herein.

It is the position of appellant that the conduct of respondent Bennett deprived her of her right to a fair determination. Allegedly, respondent considered matters outside the record and has violated her right of due process.

For this proposition, appellant relied on two cases to wit, *Farrell v. Dowling*, 90 A. D. 2d 849 (2d Dept. 1982), app. dism. 58 N. Y. 2d 1112 (1983) and *Multari v. Town of Stony Point*, 99 A. D. 2d 838 (2d Dept. 1984). The clear rationale of these cases is that matter *not raised* at the hearing may not be considered during the adjudicatory process of a civil service proceeding. This type of consideration would clearly violate on employee's right of confrontation and refutation of the materials.

It is clear that the common law rule relied on by appellant is not applicable herein.

The record clearly reflects that respondent Bennett only spoke to one person, James Mattei, about his testimony.

There, the only subject of discussion was the injury sustained by Mr. Mattei as a result of appellant's conduct on August 20, 1978. The fact that Mr. Mattei had suffered an injury was gone into at length at the disciplinary hearing.

That respondents thus submit that the appellant, in this one admitted inquiry, failed to establish that respondent Bennett considered issues not contained in the hearing record. To the contrary, the issue of the injury suffered by Mr. Mattei was explored at the time of the disciplinary hearing.

Additionally, there is no proof in the record that any new material was raised or considered. Thus, there can be no viable claim that respondent Bennett considered matters outside the record of the disciplinary hearing.

Additionally, Mr. Mattei was involved in only one of 13 specifications. As a result, any impropriety would only relate to this one specification and not the other 12.

As a result, any error on the part of respondent Bennett was harmless error. It is clear that the evidence of guilt of appellant is so overwhelming on the other specifications that little would be gained by a remand for another *de novo* determination. *Bigelow v. Board of Trustees*, 98 A. D. 2d 937 (3d Dept. 1983); *Kleinsmith v. Connelie*, 68 A. D. 2d 271 (3d Dept. 1979).

Thus, it is clear that the discussion between respondent Bennett and James Mattei only dealt with the application of the injury testified to at the disciplinary hearing, and not any new matter. As a result, any error herein was at worst harmless and of no moment.

CONCLUSION.

For all the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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